

1 KEVIN V. RYAN (CSBN 118321)
United States Attorney

2 ROSS W. NADEL (CSBN 87940)
3 Chief, Criminal Division

4 MARTHA BOERSCH (CSBN 126569)
JONATHAN R. HOWDEN (CSBN 97022)
5 PETER AXELROD (CSBN 190843)
Assistant United States Attorneys

6 HALLIE A. MITCHELL (CSBN 210020)
7 Trial Attorney, U.S. Department of Justice

8 450 Golden Gate Avenue, Box 36055
San Francisco, California 94102
9 Telephone: (415) 436-7200

10 Attorneys for Plaintiff

11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION
14

15 UNITED STATES OF AMERICA,

16 Plaintiff,

17 v.

18 PAVEL LAZARENKO,

19 Defendant.
20
21

No. CR 00-0284 MJJ

UNITED STATES REPLY TO
DEFENDANT'S OPPOSITION TO
MOTION IN LIMINE TO ADMIT
STATEMENTS OF YULIA
TYMOSHENKO AS CO-CONSPIRATOR
STATEMENTS

Date: February 26, 2004

Time: 9:30 am

Courtroom: Hon. Martin J. Jenkins

22 The defendant opposes the government's in limine motion to admit the statement of Yulia
23 Tymoshenko primarily on the grounds that, in the defendant's view, the government has
24 disavowed any notion that UESU received favorable treatment from the defendant, and because,
25 in the defendant's view, neither the indictment nor the evidence at trial could support a finding
26 that Tymoshenko is a co-conspirator. The defendant is incorrect.

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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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ARGUMENT

I. THE DEFENDANT'S CLAIMS THAT THE GOVERNMENT HAS DISAVOWED THE RELEVANCE OF TYMOSHENKO'S STATEMENTS IS WITHOUT BASIS IN THE RECORD

The defendant continues to take the government's responses to very particular, usually overbroad discovery requests, to claim that the government has somehow disavowed its theory of the case and to suggest that the Court can suppress the government's evidence or deem proffered evidence as irrelevant based upon a few lines in a pleading filed in response to hundreds, if not thousands, of defense discovery requests. However, the government has not disavowed its theory of the case, and the defendant has been on notice of that theory since the indictment was filed, and certainly since November 6, 2000, after discovery had been provided and the government had filed a Bill of Particulars, and the statements of Tymoshenko are relevant to that theory.

The indictment alleges that "when he was the First Vice Prime Minister in charge of the energy sector, Lazarenko exercised his official authority to advance the business interests of UESU so that UESU obtained the right to sell and distribute natural gas to certain commercial and state enterprises in the Dnepropetrovsk region of Ukraine." The government did not disavow this theory and in fact relied upon this language when responding to the defendant's discovery requests. Furthermore, the Bill of Particulars filed on November 6, 2000, states that the defendant "as a government official in Ukraine, would seek, demand, and receive payment from individuals and entities as a condition of doing business in Ukraine." See Bill of Particulars ¶ 2.a., attached hereto as Exhibit 1. The government further specified that the defendant "received money from companies owned or controlled by Ukrainian business woman Yulia Tymoshenko, including United Energy Systems of Ukraine ("UESU") and Somolli Enterprises, Inc., in exchange for which Lazarenko exercised his official authority in favor of Tymoshenko's companies." Bill of Particulars ¶ 2.d.

Of course, despite this information the defendant received, as well as the discovery and a witness list, the defendant waited three years to make his hundreds of discovery requests and for three years failed to seek to obtain the discovery he later claim was essential. While the

1 defendant suggests that the government's responses to his belated discovery requests somehow
2 mislead him, he fails to point to any specific discovery request that was improperly denied, or in
3 response to the motion in limine, to explain how that denied discovery request relates to the
4 statements of Yulia Tymoshenko. For instance, the government seeks to introduce the testimony
5 of Andrei Vavilov, whom the defense identified as a defense witness, who would testify about a
6 conversation he had with Tymoshenko in 1996 regarding the debt of UESU at that time. The
7 defense claims that the government has disavowed any claim that there was a debt in 1996 based
8 on its responses to the defendant's discovery requests. However, the government did no such
9 thing. Instead, the government was responding to the specific defense claim that the government
10 alleged in the indictment that "the Ukrainian government paid off UESU's debt to Gazprom."
11 See Defendant's Discovery request regarding UESU at 2.¹ To rebut this supposed allegation in
12 the indictment, the defense sought documents from the year 2000 and later, well after the events
13 charged in the indictment, and with no showing that these later documents had any relevance to
14 the debt in 1996. See, e.g., Defense Request 102 (UESU notice from June 2000); Defense
15 Request 105 (UESU agreement dated April 2000); Defense Requests 106-107 (same); Defense
16 requests 109-111 (seeking documents from 2000-2002).

17 Furthermore, although the defense now claims that it was denied discovery on this topic,
18 the defense fails to point to specific discovery requests that were denied, and in fact, the defense
19 was allowed discovery related to this issue. The defendant was granted the right to take the
20 depositions of various witnesses who would provide the testimony the defendant now claims was
21 improperly denied him, and in its order the Court noted that "Lazarenko is charged with having
22 used his government position in 1995 to put UESU in a position to distribute natural gas in
23 Ukraine" and that the government had "unambiguously" alleged that "Lazarenko exercised his
24 official authority to advance the business interests of UESU." Order on Defendant's Requests
25 for Additional Rule 15 Witnesses (August 22, 2003) at 7, 13. Thus, the Court granted the

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27 ¹ Of course, implicit in this statement by the defense is their recognition that the
28 government contended that there was a debt of UESU to Gazprom.

1 defendant's request for the deposition of Mykola Sivulsky, Volodomyr Taktai, and Volodomyr
2 Lopatin, who were to testify about the legitimate policy reasons for the restructuring and the
3 absence of debt, and the defense has not identified any other specific witnesses who would have
4 testimony on this topic and whose testimony was denied. Thus, the defendant was not denied
5 any discovery from witnesses on these topics. The only requests related to UESU and its
6 legitimacy that were denied were denied without prejudice to the defense making a further
7 showing of materiality, which the defense never did, or because the requests were overbroad and
8 lacked a specific showing of relevance to the charges in the indictment. See Order on
9 Defendant's Further Document Requests (August 22, 2003) at 14-16 ("it is up to the defense to
10 establish the materiality" and the defense had failed to show how the requested document related
11 to the charges in the indictment); Order Granting in Part and Denying in Part Defendant's
12 Motions for Discovery Pursuant to Rule 16 and Rule 17.

13 Indeed, the Court granted all the defendant's requests for documents if he had made a
14 showing that the requested documents were relevant to: 1) the transfer of title to the natural gas
15 from UESU to UEIL, 2) the transfer of money from UEIL to Somolli and the related payment
16 obligations to RAO Gazprom; 3) the Ukrainian government's conferral of the right to export
17 natural gas from the Ukraine to UESU and other companies; 4) UESU's obtaining of the right to
18 distribute natural gas in the Dnepropetrovsk region of Ukraine; 5) Ukraine's execution of the
19 \$200,000,000 guarantee; and 6) the payment of money to defendant by Somolli, UEIL, Itera, and
20 UESU. See Order Granting in Part and Denying in Part Defendant's Motions for Discovery
21 Pursuant to Rule 16 and Rule 17 at 8. Specific requests were denied only because the defendant
22 failed to show that the requested documents related to these topics, not because the topics
23 themselves were irrelevant, or because the topics had been abandoned by the government. Id.
24 ("of the approximately 123 document requests, very few of them relate to these specific areas,
25 and of those, even fewer satisfy the requirements of Rule 16 – that there be more than general
26 descriptions of documents and conclusory allegations of materiality."); id. at 12 (granting the
27 defendant's request for the Minutes of the cabinet of Ministers on June 12, 1996, at which

UESU's debt to RAO Gazprom was discussed); id. at 13 (granting request for "all reports, analyses, accountings and correspondence used by the government of Ukraine to calculate the outstanding debt to RAO Gazprom owed by UESU/UEIL for the period January 1995 through October 2001" to the extent that these relate to the debt that gave rise to the \$200,000,000 guarantee); id. (granting request for accounting of payments between RAO Gazprom and UESU on completion of Agreement #3-GU-97 as of January 1, 1999" for payments in 1997); id. (granting request for comparison accountings for "goods delivered between Central Department of Material Financial and external Relations of the Ministry of Defense of Russia and UESU Corporation" related to the agreement between the Russian Ministry of Defense and UESU that arose from the debt of UESU) id. at 27 (granting request for documents relating to negotiations between Ukraine and RAO Gazprom about the \$200,000,000 guarantee); id. at 29 (granting request for minutes of negotiations between Ukraine and RAO Gazprom regarding gas deliveries for 1996); id. at 31 (granting request for a document that would allegedly show "the complete financial and administrative activity of UESU for 1996 and the first half of 1997).

II. THE STATEMENTS OF TYMOSHENKO ARE ADMISSIBLE AS COCONSPIRATOR STATEMENTS

The statements of Yulia Tymoshenko will be admissible as co-conspirator statements. Tymoshenko was both a co-conspirator of the money laundering conspiracy charged in Count 1, and a participant in the scheme to defraud.² The actions of Tymoshenko and her companies are specifically pled in the indictment and, although she has not been charged as a conspirator, the government will introduce sufficient evidence to demonstrate that she was a participant in the conspiracy and that her statements should be admitted as coconspirator statements. The defendant fails to address any of the government's proffered evidence, and instead objects that

² The defendant drops a footnote to make the claim that the money laundering conspiracy alleged in Count One does not incorporate the wire fraud scheme. Paragraph 24 of the Second Superseding Indictment explicitly refers to and includes as part of the conspiracy the scheme to defraud alleged in Paragraphs 32 through 38 of the indictment. While the defendant appears to claim that the mere lack of the word "incorporate" in this paragraph is legally significant, he cites to no authority to support this claim.

1 the statements are inadmissible because Tymoshenko is not explicitly charged as a co-
2 conspirator. This objection is not well-taken. See United States v. Williams, 989 F.2d 1061,
3 1067 (9th Cir. 1993) (individual need not be indicted to be considered a coconspirator for
4 purposes of Rule 801(d)(2)E)). The defendant's assertion that Tymoshenko cannot be a co-
5 conspirator of the money laundering charge if she was a victim of the defendant's extortion is
6 similarly incorrect, because money laundering is a separate offense from the underlying extortion
7 and the defendant cites no authority for the proposition that the victim of an extortion could not
8 also conspire with the extortioner and others to launder the proceeds. Moreover, that
9 Tymoshenko may also have been a victim of the defendant does not mean that she did not also
10 participate in the scheme to defraud – after all, her payments to the defendant resulted in
11 significant benefits for her and her company. Finally, the defendant contends that the statements
12 are inadmissible because the government has not “provided the text of any statement” it wishes
13 to offer. However, the government has provided the statements of the witnesses who would
14 testify about Tymoshenko's statements, including Vavilov's, Flieger's, Hoffmans's, Garber's,
15 Jurach's, as well as the deposition testimony of Shostak and Kleshnya. Thus, even if this were a
16 legal basis to exclude Tymoshenko's statements, it is factually unsupportable.

17 CONCLUSION

18 For the foregoing reasons, and based on the record herein, the statements of Yulia
19 Tymoshenko in furtherance of the conspiracy and scheme to defraud should be admitted.

20 DATED: February 9, 2004

Respectfully submitted,

21 KEVIN V. RYAN
22 United States Attorney

23 
24 MARTHA BOERSCH
25 JONATHAN HOWDEN
26 PETER AXELROD
27 Assistant United States Attorneys

28 HALLIE MITCHELL
Trial Attorney, U.S. Department of Justice

EXHIBIT 1

1 ROBERT S. MUELLER, III (CSBN 59775)
United States Attorney

2 DAVID W. SHAPIRO (NYSB)
3 Chief, Criminal Division

4 JONATHAN R. HOWDEN (CSBN 97022)
Assistant United States Attorney

5 450 Golden Gate Avenue, Box 36055
6 San Francisco, California 94102
7 Telephone: (415) 436-6814

8 Attorneys for Plaintiff

9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION
12

13 UNITED STATES OF AMERICA,)

14 Plaintiff,)

15 v.)

16 PAVEL LAZARENKO,)

17 Defendant.)
18

No. CR 00- 00284 MJJ

AMENDED BILL OF PARTICULARS

19 Pursuant to this Court's order of October 12, 2000, plaintiff, the United States of America,
20 through Assistant United States Attorneys Martha Boersch and Jonathan Howden, hereby
21 submits this Amended Bill of Particulars:

22 1. The specified unlawful activity that serves as a predicate for the money laundering
23 offenses described in Counts 2 through 5 of the indictment are: receipt and transfer of property
24 that was stolen, unlawfully converted, and taken by fraud in violation of 18 U.S.C. §§ 2314 and
25 2315; extortion as specified in 18 U.S.C. § 1956(c)(7)(B)(ii); and wire fraud in violation of 18
26 U.S.C. § 1343.

27 2. As to Counts 2 through 8 of the indictment, the United States charges that the funds
28 involved in the financial transactions described in each of the counts represent the proceeds of

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NORTHERN DISTRICT OF CALIFORNIA

1 specified unlawful activity as described in Counts 6 through 8 in the indictment, and in
2 Paragraph 1, above. That activity consisted of the following illegal conduct:

3 a. Defendant Lazarenko, as a government official in Ukraine, would seek, demand and
4 receive payment from individuals and entities as a condition of doing business in Ukraine.

5 b. Defendant Lazarenko did not disclose to the people or the government of Ukraine that
6 he was receiving payments from individuals and entities doing business in Ukraine.

7 c. Defendant Lazarenko, beginning sometime in 1992, met with Peter Kiritchenko, who
8 was doing business in Ukraine, and told Kiritchenko to give a relative of Lazarenko's 50% of the
9 equity of Kiritchenko's business in Ukraine and to pay Lazarenko 50% of the profits of the
10 business, and thereafter, Kiritchenko paid Lazarenko 50% of the profits of his business in
11 Ukraine.

12 d. Defendant Lazarenko received money from companies owned or controlled by
13 Ukrainian business woman Yulia Tymoshenko, including United Energy Systems of Ukraine
14 ("UESU") and Somolli Enterprises, Inc., in exchange for which Lazarenko exercised his official
15 authority in favor of Tymoshenko's companies, and that Lazarenko failed to disclose to the
16 people and government of Ukraine that he was receiving significant amounts of money from
17 these companies.

18 e. Defendant Lazarenko received money from Mykhola Agafonov, who was the chief
19 administrator of Naukovy State Farm, in exchange for which Lazarenko exercised his official
20 authority to grant Naukovy State Farm certain rights and privileges, and that Lazarenko failed to
21 disclose to the people and government of Ukraine that he was receiving money from Agafonov
22 and Naukovy State Farm.

23 f. Beginning sometime in 1994, Defendant Lazarenko instructed Peter Kiritchenko to
24 manage bank accounts Lazarenko established in Switzerland to receive and transfer the money
25 Lazarenko received from Agafonov, UESU, Somolli, as well as other individuals and entities
26 doing business in Ukraine.

27 g. Defendant Lazarenko also instructed Peter Kiritchenko to open bank accounts in
28 Poland, Switzerland, and other countries into which Kiritchenko and other individuals and

1 entities deposited money that was corruptly and fraudulently paid for the benefit of Lazarenko.
2 These accounts were used in part to conceal and disguise the nature , origin, location, source,
3 ownership and control of the money that was paid for the benefit of Lazarenko and included:
4 Accounts held by GHP Corporation at Banque SCS Alliance (Account 5452) and at Banque
5 Populaire Suisse (Account 823896-2); accounts held by ORPHIN, SA at American Bank in
6 Poland (Account 61310) and at Banque Populaire Suisse (Account 21383); an account held by
7 Bainfield Company, Ltd. at Banque SCS Alliance (Account 5383); and account held by
8 WILNORTH, Inc. at Banque SCS Alliance (Account 5451); and an account held by PADDOX
9 INDUSTRIES at Credit Suisse (Account number 0251-875709-7).

10 g. Defendant Lazarenko instructed Peter Kiritchenko to transfer money, which was first
11 deposited into Kiritchenko's accounts, into accounts controlled by Lazarenko in Switzerland.
12 These accounts were used in part to conceal and disguise the nature, origin, location, source,
13 ownership and control of the money that was paid for the benefit of Lazarenko and included: and
14 account called KATO-82 at Credit Lyonnais (Suisse)(Account 08-0578503); an account called
15 CARPO-53 at Banque SCS Alliance (account 5353); and an account called NIHPRO at Banque
16 Populaire Suisse (Account number 21768), and later at Credit Suisse (Account number 988882-
17 52).

18 3. The receipt and transfer of property that was stolen, unlawfully converted, and taken by
19 fraud in violation of 18 U.S.C. §§ 2314 and 2315, occurred in the United States when the money
20 stolen, converted and taken by fraud was transferred to financial institutions in the United States.

21 4. The wire fraud in violation of 18 U.S.C. § 1343 occurred in the United States when
22 wirings in furtherance of a scheme to defraud were made in the United States.

23 5. The acts constituting the extortion under 18 U.S.C. § 1956(c)(7)(B)(ii); the theft,
24 conversion, and fraud under 18 U.S.C. §§ 2314 and 2315; and a scheme to defraud under 18
25 U.S.C. § 1343, occurred primarily in Kiev and Dnepropetrovsk, Ukraine, as well as in
26 Switzerland, Poland, Russia, Antigua, England, the Netherlands, the United States and

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1 elsewhere.

2 DATED: November 6, 2000

Respectfully submitted,

3 ROBERT S. MUELLER, III
4 United States Attorney

5 
6 MARSHA BOERSCH
7 JONATHAN HOWDEN
8 Assistant United States Attorney
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Meg Beardsley
Meghan Beardsley
Legal Assistant